STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2004
v	No. 246154 Wayne Circuit Court
EFRAIM GARCIA, Defendant-Appellant.	LC No. 01-011952-03

Before: Zahra, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree murder, MCL 750.316, and one count of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment without the possibility of parole, and twenty to forty years' imprisonment, and to a consecutive two-year term felony-firearm. He appeals as of right. We affirm.

Defendant's convictions arise from the shooting deaths of Jimmie Goins and Annie Johnson, and the nonfatal shooting of Shirley Johnson. During the early morning hours of July 17, 1994, Shirley Johnson was at her home with her family when multiple gunshots were fired at their house. Jimmy Goins, who was sitting on the front porch, and Annie Johnson, who was inside the house, were both killed. Shirley Johnson, who was inside the house with Annie, was also struck by gunfire, but recovered from her wounds. According to Shirley, it sounded like more than one gun was involved in the shooting. Ballistic evidence recovered from the scene was consistent with the use of both a nine- and ten-millimeter handgun.

Testimony at trial indicated that the shooting was gang-related and resulted from an earlier altercation between Jerry Waucaush and Ms. Johnson's nephew. Waucaush was the president of a gang known as the Cash Flow Posse. Defendant was an enforcer in that gang. One of the guns used in the shooting was an unusual ten-millimeter handgun and several witnesses linked defendant to that gun at the time of the shooting. Waucaush and another enforcer for the gang, Gregory Ballesteros, were originally charged in this matter, along with defendant. Waucaush and Ballesteros both agreed to plead guilty to reduced charges in exchange for their testimony against defendant. At trial, Ballesteros admitted to participating in the shooting with defendant. Ballesteros testified that he first fired at Goins with a nine-millimeter handgun, and that defendant then ran up to the house and shot Goins with the ten-

millimeter handgun as defendant stood over him. Defendant then fired several shots into the house, striking Annie and Shirley Johnson.

I

Defendant first argues that the prosecutor improperly introduced Ballesteros' prior consistent statements to bolster his testimony. Because defendant did not object to the challenged testimony at trial, this issue is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999). Under this standard, even if plain error is shown, defendant has the burden of demonstrating that he was prejudiced by the error, i.e., that the outcome was affected. *Id.*

Defendant additionally argues, however, that defense counsel was ineffective for failing to object. To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show that there was a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

MRE 801(d)(1)(B) provides as follows:

> **(d) Statements Which Are Not Hearsay.** A statement is not hearsay if--
>
> (1) *Prior Statement of Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . .

Defendant argues that Ballesteros' prior consistent statements to the FBI and the federal court were not admissible under this rule because, at the time they were introduced, Ballesteros had not yet been impeached by a prior inconsistent statement, nor been accused of recently fabricating his testimony. We disagree. Before Ballesteros testified, defense counsel questioned the FBI agent in charge of the federal proceedings in a manner suggesting that Ballesteros' proposed testimony was fabricated in order to obtain a favorable plea agreement and avoid going to prison for life. Furthermore, in his opening statement, defense counsel stated that Ballesteros' testimony was "bought and paid for" by the plea bargain he made. This record establishes that defense counsel raised the charge of recent fabrication before Ballesteros testified. See *People v Valmarcus Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000).

But in order for a prior consistent statement to be admissible under MRE 801(d)(1)(B), the statement must have been made before a motive to fabricate arose. "[A] consistent statement made after the motive to fabricate arose does not fall within the parameters of the hearsay exclusion for prior consistent statements." *People v McCray*, 245 Mich App 631, 642; 630

NW2d 633 (2001), quoting *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996). In this case, at the time Ballesteros made the prior consistent statements, he was subject to federal criminal charges associated with the crime in question and the statements were made in the context of his cooperation with the federal authorities in order to obtain favorable treatment. Thus, the statements were made after a motive to fabricate arose and were nonadmissible hearsay. *Id.; People v Lewis*, 160 Mich App 20, 29-30; 408 NW2d 94 (1987).

Nonetheless, under the plain error test, defendant must demonstrate that his substantial rights were affected, i.e., that the plain error affected the outcome of trial. *Carines*, *supra*. Similarly, in order to establish ineffective assistance of counsel, defendant must show that, had counsel objected to the testimony, there is a reasonable probability that the result of the trial would have been different. *Johnson*, *supra*.

Although the prosecutor elicited that Ballesteros had previously given statements consistent with his trial testimony, defense counsel was also able to show that the same influences and motives that allegedly tainted his trial testimony (i.e., his agreement to cooperate in order to obtain favorable treatment) also existed at the time he gave the prior statements. Further, it is apparent that Ballesteros' testimony was bolstered much more by the physical evidence in this case and corroboration from the other witnesses. Under these circumstances, we cannot say that the prosecutor's use of Ballesteros' prior consistent statements affected the outcome of this case, or that defendant was prejudiced by defense counsel's failure to object. See *McCray*, *supra* at 642-643. Accordingly, reversal is not required.

II

Defendant also argues that a new trial is required because of the prosecutor's misconduct during closing arguments. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Because defendant did not object to the challenged remarks at trial, however, this issue is unpreserved and defendant must show a plain error affecting his substantial rights. *Carines*, *supra*; *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). Reversal is not warranted if a cautionary instruction could have cured any prejudice resulting from the prosecutor's remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

A prosecutor is afforded great latitude in closing argument. He is permitted to argue the evidence and make reasonable inferences to support his theory of the case. *Bahoda*, *supra* at 282. However, the prosecutor must refrain from making prejudicial remarks. *Id*. at 283. While prosecutors have a duty to see to it that a defendant receives a fair trial, they may use "hard language" when it is supported by the evidence and they are not required to phrase their arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

Viewed in context, the prosecutor did not improperly appeal to the jurors' sympathy for the victims, or ask the jurors to decide this case based upon their moral duty when referring to defendant as "wicked." The prosecutor's remarks were based on the evidence and did not

involve an obvious plea for the jury to sympathize with the victims or their families. See *People v Watson,* 245 Mich App 572, 591; 629 NW2d 411 (2001).

We also find no merit to defendant's arguments that the prosecutor improperly urged the jurors to decide this case on moral, not legal, grounds when he argued that defendant was "pure evil," or that the prosecutor fabricated his comments about defendant's state of mind and urged the jurors to decide the case based on their civic duty.

Moreover, the challenged comments were responsive to defense counsel's closing argument. Where a prosecutor's comments are responsive, they must be considered in light of defense counsel's arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Otherwise improper remarks may not result in error requiring reversal where the remarks are made in response to defense counsel's argument. *People v Kennebrew,* 220 Mich App 601, 608; 560 NW2d 354 (1996). Because the comments were responsive to defense counsel's closing argument and the prosecutor did not interject matters beyond the evidence, we find no plain error. Reversal is not warranted.

III

Next, defendant raises additional claims of ineffective assistance of counsel. Because defendant did not raise this issue in an appropriate motion in the trial court and because defendant's motion to remand was denied by this Court, our review is limited to errors apparent from the record. *People v Wilson,* 196 Mich App 604, 612; 493 NW2d 471 (1992).

Defendant argues that trial counsel was ineffective for (1) refusing to meet with an investigator that had previously been appointed by the federal court, or review information gathered by the investigator, and (2) failing to introduce at trial a letter written by Ballesteros.

We are not persuaded that the affidavit from the private investigator establishes that defense counsel was ineffective. At best, it only establishes that defense counsel refused to meet with her. The record discloses that much of the information the investigator mentions in her affidavit was available to defense counsel, including the FBI's "302s"[1] and the FBI's copy of the Detroit Police Department's file. Although the investigator also conducted interviews and background investigations, it is not apparent from the record that defense counsel did not conduct his own investigation into these same areas. Therefore, we cannot conclude that defense counsel was ineffective for failing to take advantage of the investigator's services.

Defendant also argues that defense counsel should have used a letter that Ballesteros wrote to another gang member in which Ballesteros admitted to lying about that gang member in order to reach a plea agreement. Even assuming that Ballesteros wrote the letter, the record does not indicate that defense counsel received the letter before trial, nor has defendant made an offer of proof in this regard. Therefore, we cannot conclude that counsel was ineffective in this regard.

[1] A "302" is a witness interview form.

Defendant further requests that this Court remand this matter for an evidentiary hearing on his ineffective assistance of counsel claims. After reviewing defendant's arguments and offer of proof, we are not persuaded that defendant has shown that remand for further development of the record is necessary. See *People v Simmons,* 140 Mich App 681, 685-686; 364 NW2d 783 (1985).

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder